

**FEDERAL ELECTION COMMISSION**  
**999 E Street, N.W.**  
**Washington, D.C. 20463**

**SENSITIVE**

**FIRST GENERAL COUNSEL'S REPORT**

MUR: 5502

DATE COMPLAINT FILED: August 2, 2004

DATE OF NOTIFICATION: August 9, 2004

DATE ACTIVATED: October 14, 2004

EXPIRATION OF STATUTE OF LIMITATIONS:  
 July 27, 2009

COMPLAINANT:

Frederick H. Armstrong

RESPONDENTS:

Martinez for Senate and Charles W. Puckett, in his  
 official capacity as treasurer  
 Bush-Cheney '04, Inc., and David Herndon, in his  
 official capacity as treasurer

RELEVANT STATUTES AND  
 REGULATIONS:

2 U.S.C. § 431(8)(A)(i)  
 2 U.S.C. § 441a(a)(1)(A)  
 2 U.S.C. § 441a(a)(7)(B)  
 11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED:

Federal Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

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 SECRETARIAT

**I. INTRODUCTION**

The complaint in this matter alleges that an advertisement aired by Martinez for Senate, the principal authorized campaign committee for Mel Martinez's 2004 Senate race in Florida, is a coordinated public communication by the Martinez campaign and Bush-Cheney '04, Inc., and therefore constitutes an excessive in-kind contribution from Martinez for Senate to the Bush-Cheney campaign, in violation of 2 U.S.C. § 441a(a) and (f). As discussed in more detail below, based on the available information, it appears that the advertisement in question may have been a

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coordinated communication through a common vendor or vendors. Accordingly, this Office recommends that the Commission find reason to believe the Martinez Committee violated 2 U.S.C. § 441a(a)(1)(A)

## II. FACTS

Mel Martinez ("Martinez") ran for a Florida Senate seat in 2004. His authorized committee for that race was Martinez for Senate ("Martinez Committee"). The Florida Republican primary was held on August 31, 2004. Martinez won the Republican nomination and was elected to the Senate on November 2, 2004.

The Complaint in this matter alleges that the Martinez Committee "has repeatedly utilized the images of President George W. Bush on its website, in its mailings, and other campaign materials promoting his [Martinez's] candidacy." The Complaint primarily focuses on a television advertisement, titled "Strong Conservative" ("Advertisement"), that began airing on or about July 27, 2004, just prior to the primary election in Florida, and within 120 days of the general election.<sup>1</sup> According to the Complaint, the Advertisement was coordinated between the Martinez Committee and Bush-Cheney '04, Inc. ("Bush Committee") through a common media vendor, The Stevens and Schriefer Group ("Stevens-Schriefer"), which allegedly produced the

<sup>1</sup> While the Complaint did not identify the title of the Advertisement, it stated that it appeared on the Martinez Committee's website. The Advertisement was on the website, news articles quoted from the Advertisement, and the Response from the Martinez Committee attached invoices for the Advertisement. Although citing to the Martinez Committee's website, the Complaint does not specify in what other ways the Martinez Committee used images of President Bush. When this Office reviewed the Martinez Committee's website, it featured, in addition to the Advertisement, a photograph of President Bush and Martinez talking in the Oval Office. Moreover, according to news reports, a radio advertisement aired containing audio-clips of President Bush speaking about Martinez. Neither the Complaint nor any publicly available information provided any details regarding any mass mailings.

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- 1 Advertisement for the Martinez Committee and served as a media vendor to the Bush  
2 Committee. *See* 11 C.F.R. § 109.21(d)(4).

3 The content of the thirty-second Advertisement is as follows:<sup>2</sup>

| Audio  | Visual Images   |
|--|---|
| <b><u>President Bush:</u></b> "I'm honored to be with a great American . . .         | President Bush speaking at podium in front of crowd; "Miami, 5/20/02" appears superimposed in lower right   |
| . . . Mel Martinez, who makes a big difference in our Cabinet."                      | waving American flag appears over screen; then images of President Bush and Martinez shaking hands at two events  |
| <b><u>Announcer:</u></b> "Mel Martinez escaped communism as a young boy, alone . . . | "Mel Martinez" superimposed over pictures of Martinez as a child; other photos in background  |
| . . . and fell in love with America and freedom.                                     | "Mel Martinez, an American Story" superimposed on screen with photo of Martinez as a youth in a baseball uniform to the right and an American flag waving to the left of the screen; then flag stripes appear over screen |
| Chosen by President Bush for his Cabinet, . . .                                      | President Bush and Martinez at podium with Presidential seal appear to left of screen, with image of newspaper clipping with words "Orlando Sentinel" and "Bush picks Martinez"   |
| . . . Mel Martinez is a natural leader, . . .  | Martinez speaking at event with American flag as backdrop   |
| . . . conservative, pro-life, fierce defender of our American values."               | Scenes of Martinez talking and shaking hands with people, "Conservative," "Pro-life," and "American Values" superimposed on screen  |
| <b><u>President Bush:</u></b> "The American dream is alive . . ."                    | President Bush speaking (apparently at same event as in opening scene); waving American flag then appears over screen   |

<sup>2</sup> The ellipses simply indicate a continuation of the audio with corresponding changes in the video images, not missing or deleted audio

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|   |   |
|---|---|
| "... and well ..."                                  | Martinez walking with his arm around a boy in a baseball uniform  |
| "... and Mel Martinez ..."                          | Close-up of Martinez's face   |
| "... represents it all."                            | President Bush and Martinez together at a podium, "Mel Martinez for U. S. Senate" superimposed on screen, disclaimer "PAID FOR BY MARTINEZ FOR SENATE" appears and remains on bottom of screen until end of Advertisement |
| <b><u>Martinez</u></b> : "I'm Mel Martinez, and ... | Martinez talking to boys in baseball uniforms   |
| ... I approved this message."                       | Martinez walking and talking with woman with whom he is holding hands   |

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2           The Martinez Committee Response ("Response") contends that the Advertisement is not

3 a coordinated public communication because there was not a common vendor.<sup>3</sup> Although the

4 Complaint alleges that Stevens-Schriefer produced the Advertisement, the Response states that

5 the Advertisement "was not 'produced by one of the media vendors providing media services to

6 Bush-Cheney '04, Inc.'" Rather, according to the Response, "the [Martinez] campaign erected a

7 wall around the vendor in question (Stevens-Schriefer) and retained a separate media vendor,

8 Red October Productions, to handle any communications mentioning or showing the President."

9 However, it appears that Stevens-Schriefer and Red October Productions, Inc. ("Red October")

10 each provided services to both the Martinez and Bush campaigns during the 2004 election cycle.

11 Moreover, it appears that Stevens-Schriefer and Red October are closely related.

<sup>3</sup> The Bush Committee's Response stated that the communication at issue was not sufficiently identified in order to frame a response to "the vague allegations in the complaint."

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First, not only did Stevens-Schriefer provide advertising services for both the Bush-Cheney and Martinez campaigns, but the Martinez Committee's implication that Stevens-Schriefer did not "handle any [Martinez] communications mentioning or showing the President" appears simply to be incorrect. The home page of the Stevens-Schriefer website, [www.stevens-schriefer.com](http://www.stevens-schriefer.com), claims the company is "part of the Bush/Cheney Media Team" and provides a link to more information about re-electing President Bush. Upon entering the Stevens-Schriefer website, users are directed to a page titled "Congratulations to our 2004 winners including:" and lists both "Bush-Cheney 2004" and "Senator-Elect Mel Martinez," evidencing that both campaigns have used Stevens-Schriefer in the current election cycle. The website allows visitors to "click here to view our 2004 spots." Visitors then enter a page that allows one to view three advertisements under "Bush-Cheney '04" and three under "Mel Martinez for U. S. Senate (Florida)." Two of the latter, "Hard Work" and "Greatest Generation," utilize images of President Bush and Martinez shaking hands and mention that Martinez was a member of the "President's Cabinet." Additionally, Stuart Stevens, listed on the Stevens-Schriefer website as one of its "principles [sic]," was quoted in a media report as being "the man who crafted Mel Martinez' television campaign ads, . . . ." Brian E. Crowley, *Hispanic vote probably propelled Martinez into Senate*, Palm Beach Post, Nov. 7, 2004, at 1.

Second, Red October, which the Martinez Committee claims produced all its communications "mentioning or showing the President," also held itself out as a Bush-Cheney vendor. The Red October website, [www.redoctoberproductions.com](http://www.redoctoberproductions.com), states that the Bush Committee is a client and that Ashley O'Connor ("O'Conner"), Red October's "owner and President," "is currently serving as the Director of Production for Bush-Cheney '04." According to its website, Red October is "a full service production company" which offers services

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1 including "Producing Organized and Affordable Film or Video Shoots," "Editing Efficient and  
2 Attractive TV and Radio Spots," "Distributing Spots Quickly and Painlessly,"<sup>4</sup> and "Consulting."  
3 Reportedly, "Red October worked directly with the President's reelection campaign and was  
4 involved in all aspects of pre-production, production, and post-production of numerous television  
5 advertisements that were broadcast nationwide on network and cable television." *Red October*  
6 *Productions Produces Television Ads & Short films for Bush-Cheney Presidential Campaign*,  
7 iCOM, Dec. 2004, available at [www.icommag.com/december-2004/production-news.html](http://www.icommag.com/december-2004/production-news.html).  
8 According to this report, O'Connor "took a leave of absence" from Red October to work  
9 exclusively for the Bush Committee and Red October's executive producer, Doug Dubin,  
10 "provided all pre-production, production and post-production services" for the Senate campaign  
11 of Mel Martinez.

12 Finally, Stevens-Schriefer and Red October appear to be closely related, if not in fact the  
13 same entity. The Stevens-Schriefer website lists O'Connor as a member of their "staff and  
14 production team." O'Connor's biographical information on the Stevens-Schriefer website states  
15 she is "president of Red October Productions and has been retained by [Stevens-Schriefer] as  
16 their exclusive production agent." The Stevens-Schriefer website further lists Colston Stuart as  
17 office manager and states she "provides support for . . . Red October Productions." An article on  
18 [www.Variety.com](http://www.Variety.com) regarding a contract between a union and Red October states that Red October  
19 is "the production arm of GOP media-consulting firm Stevens and Schriefer" and that Red  
20 October "was preparing to shoot a campaign spot for President Bush at the White House." Dave  
21 McNary, *IATSE pacts with GOP's ad producer*, Feb. 11, 2004. Moreover, the invoices

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<sup>4</sup> Distribution includes "work[ing] hand in hand" with the media buyer.

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submitted with the Response show an address and facsimile number for Red October that are the same as that for Stevens-Schriefer.<sup>5</sup>

### III. ANALYSIS

Under the Federal Election Campaign Act of 1971 as amended ("Act"), no person may make a contribution, including an in-kind contribution, to a candidate and his authorized political committee with respect to any election for Federal office, which, in the aggregate, exceeds \$2,000. 2 U.S.C. § 441a(a)(1), *see* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d)(1). The Act defines in-kind contributions as, *inter alia*, expenditures made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. § 441a(a)(7)(B)(i). A communication is coordinated with a candidate, an authorized committee, a political party committee, or agent thereof if it meets a three part test: (1) payment by a third-party; (2) satisfaction of one of four "content" standards;<sup>6</sup> and (3) satisfaction of one of six "conduct" standards. *See* 11 C.F.R. § 109.21.

<sup>5</sup> The Bush Committee's disclosure reports show no payments to either Stevens-Schriefer or Red October. However, it appears that Stevens-Schriefer and Red October provided services to the Bush Committee through a third firm, Maverick Media, which served as the Bush Committee's principal media consultant. According to SourceWatch, Stuart Stevens and Russ Schriefer, principals of Stevens-Schriefer, are listed among "Maverick Media's personnel," as is O'Connor, who is listed as Maverick Media's producer. Available at [www.sourcewatch.org/wiki.phtml?title=Maverick\\_Media](http://www.sourcewatch.org/wiki.phtml?title=Maverick_Media) (citing Advertising Age). We do not yet know whether Stevens-Schriefer and Red October were subcontractors to Maverick Media or whether the relationship was structured in some other manner. Maverick Media does not appear to have provided services to the Martinez Committee.

<sup>6</sup> In *Shays v. FEC*, 02-CV-1984, slip op. at 32-48, 156-57 (D.D.C. Sept. 18, 2004) the District Court invalidated the content standard of the coordinated communications regulation and remanded it to the Commission for further action consistent with the Court's opinion. In a subsequent ruling, the Court explained that the "deficient rules technically remain 'on the books,'" and did not enjoin enforcement of this (or any other) regulation pending promulgation of a new regulation. *Shays v. FEC*, 02-CV-1984, slip op. at 2 (D.D.C. Oct. 19, 2004). The part of the ruling concerning the content standard is now on appeal. *Shays v. FEC*, No. 04-5352 (DC Cir. filed Sept. 28, 2004).

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1 In this matter, the first prong of the coordinated communication test is satisfied because  
2 the Martinez Committee is a third-party payor. The second prong of this test, the content  
3 standard, is also satisfied because the Advertisement meets the definition of “public  
4 communication” under 11 C.F.R. § 100.26, refers to a clearly identified candidate for public  
5 office (President Bush), and appeared within 120 days of the Presidential general election.<sup>7</sup> See  
6 11 C.F.R. § 109.21(c)(4). Therefore, a finding that the Martinez Committee engaged in  
7 coordinated communications through a common vendor or vendors depends, at this stage, on an  
8 analysis under the “conduct” prong of the coordinated communications test.

9 Three elements must be present for a commercial vendor to be defined as a common  
10 vendor under 11 C.F.R. § 109.21(d)(4). First, the person paying for the communication must  
11 have employed or contracted with a commercial vendor to create, produce, or distribute the  
12 communication. 11 C.F.R. § 109.21(d)(4)(i). Both Stevens-Schriefer and Red October are  
13 engaged in the regular business of media consulting and advertising production; thus they qualify  
14 as commercial vendors. 11 C.F.R. § 116.1(c). The Martinez Committee contracted with Red  
15 October to produce the Advertisement and with Stevens-Schriefer to produce other  
16 communications.

17 Second, that commercial vendor must have provided any of certain enumerated services  
18 to the clearly identified candidate during the current election cycle. 11 C.F.R. § 109.21(d)(4)(ii).  
19 Both Stevens-Schriefer and Red October appear to have provided several of the services to Bush-  
20 Cheney '04, Inc., including development of media strategies, developing the content of public

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<sup>7</sup> “Public communication means a communication by means of any broadcast, cable or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing or telephone bank to the general public, or any other form of general public political advertising. The term public communication shall not include communications over the Internet.” 11 C.F.R. § 100.26. The public communication must be directed to voters in the (footnote continued on next page)

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communications, producing public communications, and media consulting. 11 C.F.R. § 109.21(d)(4)(ii)(A), (E), (F), and (I).

Finally, that commercial vendor must have used or conveyed to the person paying for the communication:

(A) Information about the clearly identified candidate's campaign plans, projects, activities or needs . . . and that information is material to the creation, production, or distribution of the communication; or (B) Information used previously by the commercial vendor in providing services to the candidate who is clearly identified in the communication, or his or her authorized committee, . . . , or an agent of the foregoing, and that information is material to the creation, production, or distribution of the communication.

11 C.F.R. § 109.21(d)(4)(iii). Because the first two parts of the common vendor test are met, there is reason to investigate whether the use or exchange of information occurred as described in 11 C.F.R. § 109.21(D)(4)(iii). If they did, all three parts of the coordination test will be met, and a portion of the costs of the Advertisement or any other coordinated communication would be a contribution from the Martinez Committee to Bush-Cheney '04. 2 U.S.C. § 441a(a)(7)(B)(i). As the portion would likely exceed \$2,000, it would constitute an excessive contribution in violation of 2 U.S.C. § 441a(a)(1)(A).

The Martinez Committee's claim that an ethical wall between Stevens-Schrieffer and Red October was in place appears to be at odds with the facts known to us at this time; but even if such a barrier existed, it would not, by its mere existence, be legally sufficient to overcome the common vendor standard. First, the Commission has stated it "does not agree that the mere existence of a confidentiality agreement or ethical screen should provide a *de facto* bar to the enforcement of the limits on coordinated communications imposed by Congress" because such

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jurisdiction of the clearly identified candidate. 11 C.F.R. § 109.21(c)(4)(iii) The Commission has defined jurisdiction for a Presidential candidate to be "the entire United States." E&J, 68 Fed. Reg. 421, 431 (Jan. 3, 2003)

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1 “arrangements are unlikely to prevent the circumvention of the rules.” Explanation and  
2 Justification (“E&J”), 68 Fed. Reg. 421, 435 (Jan. 3, 2003).

3 Second, the applicable rules defining common vendors emphasize substance over form;  
4 when entities such as Red October and Stevens-Schriefer are closely related, including  
5 overlapping personnel, their particular organizational form will not prevent an investigation of  
6 whether the entities used information in the same manner as a common vendor. 11 C.F.R.  
7 § 109.21(d)(4). In explaining its regulation, the Commission explicitly addressed situations in  
8 which “a commercial vendor may qualify as a common vendor under 11 CFR 109.21(d)(4) even  
9 after reorganizing or shifting personnel.” E&J, 68 Fed. Reg. 421, 435 (Jan. 3, 2003). The  
10 Commission stated the regulation “focus[es] on the use or conveyance of information used by a  
11 vendor, including its owners, officers, and employees, in providing services to a candidate [or  
12 committee], rather than the particular structure of the vendor.” *Id.* Both Red October and  
13 Stevens-Schriefer personnel were apparently in positions to use and convey material information  
14 about the Bush re-election strategy to the Martinez Committee. *See* 11 C.F.R.  
15 § 109.21(d)(4)(iii).<sup>8</sup>

16 Accordingly, this Office recommends that the Commission find reason to believe that  
17 Martinez for Senate and Charles W. Puckett, in his official capacity as treasurer, violated  
18 2 U.S.C. § 441a(a)(1)(A). An in-kind contribution resulting from a coordinated communication  
19 through a common vendor is not considered received or accepted by the candidate or committee

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<sup>8</sup> The Complaint alleges the actions by the Martinez Committee “willfully and deliberately” jeopardized the Bush Committee through the coordinated communication, but does not specifically allege that the Martinez Committee “knowingly and willfully” violated the law. The Response stated the Martinez Committee was familiar with the applicable law, and it is possible that further investigation may reveal that there was a knowing and willful violation of the law. However, there is insufficient basis at this juncture to recommend knowing and willful reason to believe findings

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1 with whom or which the communication was coordinated unless that candidate engaged in  
2 conduct described in 11 C.F.R. § 109.21(d)(1)-(3). 11 C.F.R. § 109.21(b)(2). At this juncture,  
3 there is insufficient information showing that the Bush Committee engaged in the conduct  
4 described in 11 C.F.R. § 109.21(d)(1)-(3). However, it is possible that our investigation may  
5 uncover evidence that would implicate the Bush Committee in such conduct. Accordingly, this  
6 Office makes no recommendation at this time regarding Bush-Cheney '04, Inc. and David  
7 Herndon, in his official capacity as treasurer.

8 **IV. PROPOSED DISCOVERY**

21 **V. RECOMMENDATIONS**

- 22 1. Find reason to believe that Martinez for Senate and Charles W. Puckett, in his  
23 official capacity as treasurer, violated 2 U.S.C. § 441a(a)(1)(A).  
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2. Approve the attached Factual and Legal Analysis.

3.

4. Approve the appropriate letters.

2/14/05  
Date

Lawrence H. Norton  
Lawrence H. Norton  
General Counsel

Lawrence L. Calvert Jr.  
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Deputy Associate General Counsel  
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Susan L. Lebeaux  
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Attachment:

1. Factual and Legal Analysis

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